92-1403

NO.

Supreme Court, U.S.
FILED
MAR 10 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

ALEX STEINBERGH AND R. STANLEY BOWDEN,
TRUSTEES OF 16 CHAUNCY TRUST

Petitioners,

v.

CITY OF CAMBRIDGE AND THE RENT
CONTROL BOARD OF CAMBRIDGE,

Respondents,

**Petition for a Writ of Certiorari to
the Supreme Judicial Court of Massachusetts**

PATRICIA RANDALL
Hamilton, Dahmen & Randall
73 Tremont Street
Boston, Massachusetts 02108
(617) 523-3716
Counsel of Record

FREDERICK B. HAYES, III
Hayes, Clark, Hunt & Embry
43 Thorndike Street
Cambridge, Massachusetts 02141
(617) 494-4800

No.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1992

ALEX STEINBERGH AND R. STANLEY BOWDEN,

TRUSTEES OF 16 CHAUNCY TRUST

Petitioners,

v.

CITY OF CAMBRIDGE AND

RENT CONTROL BOARD OF CAMBRIDGE

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Alex Steinbergh and R. Stanley Bowden, Trustees of 16 Chauncy Trust, petition for a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

QUESTION PRESENTED

1. Whether an unconstitutional regulatory taking of property occurs under the Fifth and Fourteenth Amendments to the United States Constitution and the standards established by this Court in Nollan v. California Coastal Commission, when an owner is not compensated for losses sustained as a result of the application to his property of a provision of a municipal rent control ordinance later invalidated by the Massachusetts Supreme Judicial Court as "not necessary" to the administration of rent control Cambridge, Massachusetts.

LIST OF PARTIES

The caption of the case contains the names of all parties to the proceeding in the Massachusetts Supreme Judicial Court whose judgment is sought to be reviewed.

TABLE OF CONTENTS

QUESTION PRESENTED	ii
LIST OF PARTIES	iii
TABLE OF AUTHORITIES	v
OPINION BELOW	2
JURISDICTION	2

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED 3

Fifth Amendment 3

Fourteenth Amendment 3

Cambridge Rent Control Act 4

Cambridge Ordinance 5

Cambridge Ordinance, Subsection c 1/2 8

STATEMENT OF THE CASE 9

PROCEDURAL HISTORY 11

REASONS FOR GRANTING THE WRIT 21

CONCLUSION 59

TABLE OF AUTHORITIES

CASES

Adolph v. Federal Emergency Management Agency, 854 F.2d 732 (5th Cir. 1988) 52

Agins v. City of Tiburon, 447 U.S. 255 (1980) 30, 31, 34

Builders Service Corp. v. Planning and Zoning Commission of the Town of East Hampton, 208 Conn. 267; 545 A. 2d 530 (Conn. 1988) 54

Commercial Builders of Northern California v. Sacramento, 941 F.2d 872, (9th Cir. 1991), cert. denied, ____ U.S. _____; 112 S.Ct 1997 (1992). 51, 52

Department of Natural Resources v. Indiana Coal Council, Inc. 542 N.E.2d 1000 (Ind. 1989) 55

Esposito v. South Carolina Coastal Council, 939 F. 2d 165 (4th Cir. 1991) cert. denied, _____ U.S. _____; 112 S.Ct. 3027 (1992) 38, 39

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987) 23

Flynn v. Cambridge, 383 Mass. 152; 418 N.E. 2d 335 (1981) 24, 25

Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875, appeal dismissed,(1983) 45-46

Grand Forks - Traill Water Users, Inc. v. Hjelle, 413 N.W.2d 344 (N.D. 1987) appeal dismissed, 484 U.S. 1053 (1988) 56, 57

J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581; 432 A2d 12 (1981) 33

Kaiser Aetna v. United States, 444 U.S. 164 (1979) 44-45, 46

Loretto v. Teleprompter Manhattan CATV Corp. 458 U.S. 419 (1982) 44, 45, 46, 53

McKay Creek Valley Assoc. v. Washington County, 114 Or. App. 95; 834 P.2d 482 (Or. App. 1992) 57-58

Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172 (4th Cir. 1988) 52

Nectow v. Cambridge, 277 U.S. 502 (1928) 30

Nollan v. California Coastal Commission, 483 U.S. 825 (1987) 11, 30, 31, 32, 33, 39, 45, 46, 50, 53

Penn Central Trans. Co. v. City of New York, 438 U.S. 104 (1978) 30

Pennell v. City of San Jose, 485 U.S. 1 (1988) 42-43

Reahard v. Lee County, 968 F.2d 1131 (11th. Cir. 1992) 53-54

River Birch Associates v. City of Raleigh, 326 N.C. 100; 388 S.E.2d 538 (N.C. 1990) 56

Saunders v City of Jackson, 511 So. 2nd 902 (Miss. 1987) 55, 56

Seawall Associates v. City of New York, 74 N.Y. 2d. 92; 544 N.Y.S. 2d 542; 542 N.E.2d 1059 (1989),cert. denied, 493 U.S. 976 (1989) 47

St. Bartholomew's Church v. City of New York, 914 F.2d 348 (2d Cir. 1990), cert. denied,_____ U.S. _____, 111 S. Ct. 1103 (1991) 52

Steinbergh, et al. v. City of Cambridge, et al., 413 Mass. 736; 604 N.E. 2d 1269 (1992)
10, 14, 16, 20, 21, 22, 23, 36, 37, 38, 40-41, 44, 51-52, 58

Steinbergh, et al. v. Rent Control Board of Cambridge, 406 Mass. 147; 546 N.E. 2d 169 (1989)
10, 16, 17, 23, 25, 26, 27, 28, 29, 34, 35, 43

United States v. General Motors Corp., 323 U.S. 373 (1945) 46

Yee v. City of Escondito, _____ U.S. _____; 112 S.Ct. 1522 (1992) 42, 45, 47

CONSTITUTION

U.S. Constitution, Amendment 5 3, 18

U.S. Constitution, Amendment 14 3-4

STATUTES

28 U.S.C. § 1257(a) 2

42 U.S.C. § 1983 18, 19

Massachusetts General Laws, Chapter 79 18

No.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, 1992

ALEX STEINBERGH AND R. STANLEY BOWDEN,

TRUSTEES OF 16 CHAUNCY TRUST

Petitioners,

v.

CITY OF CAMBRIDGE AND

RENT CONTROL BOARD OF CAMBRIDGE

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Alex Steinbergh and R. Stanley Bowden, Trustees of 16 Chauncy Trust, petition for a Writ of Certiorari to review the judgment of the Supreme Judicial Court of Massachusetts.

OPINION BELOW

The opinion of the Supreme Judicial Court of Massachusetts is reported at 413 Mass. 736; 604 N.E.2d 1269 (1992). A copy of the opinion appears as Appendix A.

JURISDICTION

The opinion and order of the Supreme Judicial Court of Massachusetts were entered on December 10, 1992. (Appendix A) The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a), because a title, right, privilege or immunity was claimed under the Constitution of the United States by the plaintiffs below, which claim was denied by the Supreme Judicial Court of Massachusetts.

The petitioners claim that the

decisions of this Court are contrary to that result and that the Supreme Judicial Court of Massachusetts should be so instructed.

CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall... be deprived of...property, without due process of law; nor shall private property be taken... for public use, without just compensation.

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> Section 1. All persons born or

> naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Cambridge Rent Control Act, Massachusetts St. c 36 of 1976, provides for the control of rents and evictions for certain rental units within the city of Cambridge, Massachusetts. Its text is set out, in relevant part, in the Appendix as

Appendix C.

The Cambridge Removal Permit Ordinance, Ordinance 966, as amended, is intended to prevent the "removal" of "controlled rental units" from the Cambridge rental market. It provides in relevant part:

(b) Definitions. As used in this section:

(1) "Act" means Chapter 36 of the Acts of 1976, as amended from time to time.

(2) "Board" means the Rent Control Board established by section 5 of the Act.

(3) "Controlled rental unit" means any unit included in the definition under section 3(b) of the Act.

(4) "Removal from the market" as applied to a controlled rental unit,

includes but is not limited to:

(i) occupy, as an owner of a unit which is a condominium unit, if the most recent occupant was a tenant, even if the prospective owner-occupant is the tenant, unless the prospective owner-occupant is the current tenant of the unit who has continuously occupied it as a tenant since before August 10, 1979 and intends in good faith to occupy it indefinitely as its owner; or

(ii) demolish, but no unit has been removed from the market by demolition until its physical destruction has begun; or

(iii) rehabilitate, repair or improve, other than as required by the laws of the Commonwealth or the city, in such a way as to prevent residential occupancy

during the course of the rehabilitation, repair or improvement. This provision shall not apply to rehabilitation, financed at least in part by Community Development Block Grant funds, of a building owned by a non-profit corporation and intended for owner-occupancy by low and moderate income persons; or

(iv) convert to a cooperative, as the term is used in section 3(b)(4) of the Act, all or part of any building which contains any controlled rental unit; or

(v) cause a unit, not the primary residence of a legal unit owner, to be vacant for one hundred twenty (120) days or more by refusing to rent or to offer for rent such unit in good faith or, when a unit is cited as unfit for human

habitation, by failure to perform repairs required to restore said unit to habitable condition. The existence of a vacancy for one hundred twenty (120) days or more, without a showing of good cause, shall constitute removal from the market....

(c) Removal regulated.

No owner or other person shall remove from the market any controlled rental unit, unless the Board after a hearing grants a permit....

Subsection c 1/2 of Cambridge Ordinance 966, as amended, regulated the sales of certain rent controlled condominium units. It provided in relevant part:

(c 1/2) Prohibited acts by developers.

After August 1, 1981, no owner of a building for which a condominium master deed has been recorded shall directly or indirectly sell, or offer for sale, or agree to sell any controlled rental unit therein, unless the Board has granted a removal permit for that unit, or unless the sale or offer is to, or the agreement is with, a current tenant of the unit who holds an exemption certificate.... Nothing in this subsection shall prevent an owner of a building or any portion thereof from conveying his entire interest in the building in good faith to one purchaser, who shall then be subject to the provisions of this subsection to the same extent as the original owner.

STATEMENT OF THE CASE

This Petition seeks review of an opinion and order of the Supreme Judicial Court of Massachusetts dated December 10, 1992. In that opinion the court held that an invalid municipal rent control ordinance, which prevented the petitioners from selling their condominium units for over two years, did not effect an unconstitutional regulatory taking of that property despite the court's prior holding that the disputed ordinance was invalid as it was "not necessary" to the advancement of rent control. Steinbergh et al v. City of Cambridge, et al., 413 Mass 736, 747; 604 N.E.2d 1269, 1273 (Mass. 1992) (Steinbergh II). (Appendix A) Petitioners contend that the decision is contrary to the requirement that a governmental land

use regulation must "substantially advance" a "legitimate state interest", Nollan v. California Coastal Commission, 483 U.S. 825, 834 (1987), to avoid being an unconstitutional taking of property. Petitioners contend that as a matter of constitutional law, a municipal ordinance which has been judicially invalidated as "not necessary" to a legitimate state interest cannot be deemed to "substantially advance" that interest and hence avoid the constitutional command of compensation for loss.

PROCEDURAL HISTORY

A. Background.

This case has its genesis in 1976. In that year the Massachusetts legislature adopted St. 1976, c.36, the Cambridge Rent

Control Act ("Act"), which allowed the city of Cambridge to control rents and restrict evictions for certain residential rental units within the city. In 1979, citing a continuing loss of rental housing, the Cambridge City Council enacted the so-called "Removal Permit Ordinance" ("Ordinance") which, inter alia, regulates the conversion of controlled rental units to condominiums; forbids the owner-occupancy of any units so converted; prevents the demolition of these units; and prohibits owners from withdrawing these units from the rental market for vacancies of more than 120 days.[1] (Appendix C).

---

[1] The Ordinance has subsequently been codified as Cambridge City

In 1981, the city amended the Ordinance by adding subsection c 1/2. The subsection provided that an owner of controlled rental units which had been converted to condominium units in a building could not sell less than all of his or her units in the building without first obtaining a removal permit from the Rent Control Board ("board"). The provision was passed despite the existing Ordinance and Act which, as noted above, already prevented such units from being

---

Ordinance Chapter 8.44 et seq. For purposes of continuity with the decision in question it will be referred to herein under its previous style.

owner-occupied, demolished, kept vacant or rented for more than the legal maximum rent. The subsection did not affect the status of the units under the Act or the Ordinance in any manner, except to prevent individual unit sales.

B. Procedural History

1. Steinbergh v. Rent Control Board of Cambridge ("Steinbergh I"). (Appendix B).

In August, 1986 the petitioners purchased fifty-three controlled condominium units in a building at 16 Chauncy Street, Cambridge. The petitioners wished to sell separate units to individual investors, not as a block, and requested the board's permission to do so. In the administrative hearing the owners first raised their claim that a refusal to allow

individual unit sales would be an unconstitutional regulatory taking of their property under the state and federal constitutions and would violate their rights to due process and equal protection. On September 14, 1987 the board denied the owners' request.

In accordance with the Act, the petitioners appealed the board's decision to the Massachusetts Superior Court for Middlesex County. The petitioners argued that the city lacked the statutory authority under the Massachusetts Home Rule Amendment, G.L. Const. Amend. Act. 2 Section 7 (5) as amended by Art. 8, to enact subsection c 1/2 since it was not "necessary" for the furtherance of rent control. The petitioners also renewed their

constitutional claims. Steinbergh II, supra at 740; 604 N.E.2d at 1273. The Superior Court, without opinion, affirmed the board's decision. The Massachusetts Supreme Judicial Court, upon application for Direct Appellate Review, reversed. Steinbergh v. Rent Control Board of Cambridge, 406 Mass. 147, 546 N.E. 2d 169 (1989) (Steinbergh I). (Appendix B)

In Steinbergh I the court agreed with one of the owners' arguments that the city lacked the statutory authority to enact subsection c 1/2, since it was "not necessary to the achievement of rent control objectives." Steinbergh I, supra at 151; 546 N.E.2d at 172. The court opined that the subsection did "absolutely nothing to change the status of the units

whose sale it regulates", Id. at 152; 546 N.E. 2d at 172 and that its relationship to rent control was "minimal". Id. The subsection was declared "invalid". Id. at 155; 546 N.E.2d at 174. Since the matter was decided on the basis of the city's authority, the court found it "unnecessary to consider the other points argued", Id. at 148; 546 N.E.2d at 170 including the owners' claim that the subsection and the board's actions had effected a taking of their property.

2. Steinbergh v. City of Cambridge ("Steinbergh II"). (Appendix A).

After the decision in Steinbergh I, the petitioners filed a second complaint in the Superior Court against both the city of Cambridge ("the city") and the board. In

the complaint, the owners alleged that the board had wrongfully prevented them from selling any of their 53 individual condominium units as separate units between the board's decision in September, 1987 until the decision of the Supreme Judicial Court on November 20, 1989 in Steinbergh I. The owners claimed that as a result they were entitled to compensation from the city for their substantial monetary losses caused by the 26 month delay. The owners sued pursuant to 42 U.S.C. § 1983 and Massachusetts General Laws Chapter 79 claiming a temporary regulatory taking of their property. The owners alleged violations of the just compensation clause of the Fifth Amendment to the United States Constitution, and the Reasonable

Compensation Clause of Article 10, Part 1 of the Massachusetts Declaration of Rights. The owners also claimed that the board's action violated their rights to due process and equal protection under the respective constitutions and that they were therefore entitled to damages pursuant to 42 U.S.C. § 1983.

The city and board (hereinafter referred to collectively as "the city") answered and denied the owners' right to damages. After some discovery, the city moved for Summary Judgment claiming that there were no genuine issues as to material facts and that the owners as a matter of law could not prevail on their constitutional claims. The city also claimed that the complaint was procedurally barred by the doctrine of issue preclusion.

The owners filed an Opposition and Cross-Motion for Summary Judgment. The owners claimed that as a matter of law they were entitled to a Partial Summary Judgment since the action by the city had violated their constitutional rights. The owners further contended that they were entitled to a trial on damages.

The Superior Court denied the city's procedural arguments but agreed that as a matter of law the owners were not entitled to damages. Summary Judgment was entered for the defendants. The owners' cross-motion was denied. Steinbergh II, supra at 739; 604 N.E.2d 1269.

The owners appealed. The city cross-appealed the denial of their procedural arguments. The matter was accepted by the Massachusetts Supreme

Judicial Court upon the petitioners' Application for Direct Appellate Review. Id.

Upon review, the court upheld the decision of the Superior Court. Steinbergh II, supra at 739; 604 N.E.2d at 1272. The court held on federal constitutional grounds that the action of the board did not require compensation under the Just Compensation Clause or damages for violations of due process or equal protection. Steinbergh II, supra at 795; 604 N.E.2d at 1278.

REASONS FOR GRANTING THE WRIT

THE MASSACHUSETTS SUPREME JUDICIAL COURT DECISION IS IN DIRECT CONFLICT WITH THE DECISION OF THIS COURT IN NOLLAN V. CALIFORNIA COASTAL COMMISSION AS TO THE APPLICATION OF THE "SUBSTANTIAL

ADVANCEMENT" STANDARD IN JUST COMPENSATION CASES.

In Steinbergh II, the Massachusetts Supreme Judicial Court in its decision opines that the Nollan decision does require a heightened level of scrutiny in regulatory taking cases, Steinbergh II, supra at 745; 604 N.E. 2d at 1276. The court, citing Nollan, formulates the test as "whether the regulation advanced the objects of rent control and did so substantially." Steinbergh II, supra at 746; 604 N.E.2d at 1276. Having stated its concurrence with the standard however, the court does little more than analyze the subsection as being rationally related to rent control. That this is so requires little more than a brief review of the

interplay of the Act, the Ordinance, subsection c 1/2 and a comparison of the language used in Steinbergh I and Steinbergh II. [2]

With few delineated exceptions, all rental housing in Cambridge which was constructed before 1969 is subject to the

---

[2] The court did not reach, but appears to assume, that if a "temporary taking" were found, the owners would be entitled to damages under First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987). Steinbergh II, supra at 742, n.6; 604 N.E.2d at 1274, n.6.

Cambridge Rent Control Act. The Act, which was purportedly enacted to assure decent, affordable rental housing, sets limits on rent increases and evictions. In that manner the Act seeks to regulate the cost and availability of such rental housing. Flynn v. Cambridge, 383 Mass. 152; 418 N.E. 2d 335 (1981).

However, prior to 1979, even under the Act rental units could be legally "removed" from the rental housing market by a variety of means, e.g. demolition, commercial rental, or combination of units. One additional way in which units could be "removed" was by conversion of the building to the condominium form of ownership and subsequent occupancy of the units by the unit purchasers.

As a result, perceiving that this last

manner of "removal" was a threat to the "rent control experiment", Steinbergh I, supra at 154; 546 N.E.2d at 173, Cambridge, in 1979, enacted the so-called "Removal Permit Ordinance". With few exceptions the Ordinance makes it illegal to owner-occupy rent controlled condominiums or to withdraw such units from the rental market for more than one hundred and twenty (120) days. Ordinance, § 1(b)(4). See Flynn, supra at 155-156; 418 N.E.2d. at 335. The prohibition on such owner-occupancy was purportedly enacted to prevent the conversion of such units from rental to owner-occupied housing. Id. at 159; 418 N.E.2d at 337.

Thus the stated purpose of the Act is to assure the supply of affordable rental housing by restricting rent increases and

evictions on those units controlled. Act at § 1. In contrast, the Ordinance seeks to preserve the supply of rental housing stock by assuring that the number of controlled rental units may not be reduced, by any means, including owner-occupancy, unless with permission of the board. Ordinance at § 1 (b)(4). The board, and the city, were invested with a "panoply of powers" to assure that no such units were lost - including the right to seek declaratory and injunctive relief as well as criminal and civil penalties. Ordinance at § 1(g); Steinbergh I, supra at 154; 546 N.E.2d at 173. In combination, the Act and the Ordinance make it impossible to evict a tenant for the purpose of owner-occupancy - unless the board approves.

Subsection c 1/2, which was enacted in

1981, did "absolutely nothing to change the status of the controlled units whose sale it regulates." Steinbergh I, supra at 152; 546 N.E. 2d at 172. Those units remained under rent control protection. The subsection did not modify the provision on illegal owner-occupancy. Such occupancy remained forbidden under the other sections of the Ordinance. All subsection c 1/2 did was to require any owner of more than one rent controlled, condominium unit in a building which was subject to the ordinance, to sell them all, at the same time, to the same purchaser, unless the board granted a permit otherwise. The subsection had no effect whatsoever on the rent control/ordinanced status of the units. Ordinance, at subsection c 1/2.

In Steinbergh I, the Massachusetts

Supreme Judicial Court agreed and concluded that the language and "regulatory mechanism established in subsection c 1/2 is not necessary to the achievement of rent control objectives." Id. at 151; 546 N.E.2d at 172 (emphasis supplied). The court stated that the subsection created no change in the status of the units to which it applied, much less a change deemed "necessary to the furtherance of rent control." Id. at 152; 546 N.E.2d at 172. The court also rejected the assertion that subsection c 1/2 was "necessary" as an enforcement tool:

> "It is unreasonable to suggest that simply because violations might be continuing to occur despite this panoply of powerful enforcement mechanisms, a new remedy, of a drastic

nature, is 'necessary' to save the rent control experiment from failure".

Id. at 154; 546 N.E.2d at 173.

Indeed, precisely because subsection c 1/2 was "not necessary" to rent control, it was deemed to be an unauthorized and impermissible municipal action and was held to be "invalid". Id. at 155; 546 N.E.2d at 174.

In Steinbergh I the court never reached the takings issue. Id. at 148; 546 N.E.2d at 170. However, when Steinbergh I is analyzed according to Nollan, there can be little doubt that subsection c 1/2 effected an uncompensated regulatory taking.

The axiom that a governmental regulation may be a taking if it fails to substantially advance a legitimate state

interest has long been recognized by this Court. See, e.g. Nectow v. Cambridge 277 U.S. 183, (1928); Penn Central Transportation Company v. City of New York, 438 U.S. 104, (1978); Agins v. City of Tiburon, 447 U.S. 255; (1980). The concept was most thoroughly explored in Nollan v. California Coastal Commission, supra, where this Court clearly stated that if a governmental regulation did not "substantially advance a legitimate governmental interest" that failure in itself was a sufficient basis to find a taking. Id., at 834. The Nollan decision was also explicit that the standard against which "substantial advancement" was to be measured was much higher than the traditional "rational relationship" test recited in due process and equal protection

cases. Id. at 834, n.3.

In Nollan , this Court held that the California Coastal Commission's conditioning of a building permit upon the granting of an easement was a violation of Fifth Amendment rights and failed the "substantial advancement" standard. Id. at 842. In explanation, this Court first noted that a "land use regulation does not effect a taking if it "substantially advance[s] legitimate state interest..."Id. at 834 citing Agins, supra, at 260. (1980). The case specified that there must be a clear connection - a "nexus" - between the state interest and the challenged regulation necessary to pass constitutional scrutiny; in effect the regulatory action must serve the same purpose which is alleged to be the "legitimate state

interest." Id. at 837. In addition, Nollan specified that for there to be sufficient connection between the regulation and the state interest to be served, the regulation must "substantially advance" that interest. Id. at 834.

This Court warned that the phrase "substantially advance" is not to be taken lightly:

> "As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advanc(ing)' of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land

use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective."

Id. at 841. (emphasis in original). Nollan held that if the restriction does not "substantially advance" the legitimate state interest which forms the original purpose of the restriction "the... restriction is not a valid regulation of land use but 'an out-and-out plan of extortion...'" Id. at 837, citing J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981). The Court expressly rejected the proposition that the restriction need only be "rationally related" to the state interest to survive scrutiny. Nollan, supra at 834, n. 3.

In short, if, as in this case, a regulation is being challenged as an "as applied" taking of property, constitutional doctrine, as stated in Agins and Nollan, requires an examination of the relationship between the challenged law and the state interest sought to be advanced. If the law does not "substantially" advance the state interest, a taking has occurred even if the owner has not been denied all use of his land. Agins, supra at 260.

The court's analysis in Steinbergh I precludes approval under the Nollan standards. As noted above, instead of finding that the subsection substantially advanced rent control the court held that the subsection produced "little incremental enforcement advantage" for detecting violations. Steinbergh I, supra at 153;

546 N.E.2d 173. To the contrary, the court did not find that the subsection advanced rent control at all. Rather, the court found that the subsection did "absolutely nothing to change the rent control status of the units whose sale it regulates." Id. at 152; 546 N.E.2d 172. The subsection "merely sets up another regulatory obstacle which owners must overcome before they legally may alienate their property." Id. at 152; 546 N.E.2d 172.

The best that could be said for the subsection was that it might ease the enforcement of existing laws. But that ease of enforcement was found by the court to be unnecessary given the existing enforcement powers contained in the Ordinance. Id. at 154; 546 N.E.2d 169. Under the Nollan analysis, the only

legitimate conclusion is that subsection c 1/2 did not substantially advance rent control and resulted in a regulatory taking.

Nevertheless, the Massachusetts Supreme Judicial Court, in Steinbergh II, reached a contrary result. In Steinbergh II the "unnecessary" subsection was transformed into a municipal enactment which "substantially advanced the purpose of rent control." Id. at 746; 604 N.E. 2d at 1276. The analysis used by the court to reach that conclusion reveals much about how the court - despite its language to the contrary - has failed to carry out the Nollan admonition.

First, the court notes that the city council in 1981 had information that some owners of rent-controlled units were

unlawfully occupying them, and second, that the task of monitoring new sales was "intrusive" "impossible" and "financially burdensome". Steinbergh II, supra at 746.; 604 N.E.2d. at 1277. Next, the court opines that the city council could have concluded that "developer sales are tantamount to removal from the rental market." Id. Therefore, by permitting only group sales "the ordinance provision eliminated one circumstance (developer sales) by which people had been owner-occupying rent-controlled condominium units". Id. at 746-747; 604 N.E.2d 1277. As a result the court states that the subsection, though not "necessary" under state law, is sufficient to meet the heightened constitutional standard. Id. The reason for approval is clearly stated:

"The elimination ... of conditions that created a substantial risk of difficult-to-discover violations of an aspect of the rent control law substantially advanced the operation of the Cambridge rent control law."

Id. at 746-747; 604 N.E.2d 1269.

The court attempts to buttress its conclusion by citing Esposito v. South Carolina Coastal Council, 939 F. 2d 165. (4th Cir. 1991) cert. denied, _____ U.S. _____, 112 S. Ct. 3027, (1992) and finding that the ordinance had the "essential nexus" required by Nollan since the ordinance provision was a "logical and sufficiently well-founded approach to dealing" with the problem of unlawful occupation of rent-controlled condominium units. Steinbergh II supra at 747, 604

N.E. 2d at 1277 citing Esposito, supra at 169.

This citation and reasoning are misplaced. It is true that the precise "fit" needed between a regulation and a governmental goal has not been delineated by this Court. Nollan, supra at 834. It is also true that "a broad range of governmental purposes and regulations satisfies these requirements". Id. at 835.

But that analysis, as shown in Steinbergh II, clearly misses the point. The "nexus" requirement means that the regulation must, at least in a rational way, have some connection with the legitimate state interest to be served. Nollan, supra at 837. But a rational connection between the regulation and the

goal is not enough. Once the connection is established, by whatever test, the challenged regulation must "substantially advance" the goal to be served. Though a rational relation between the subsection and rent control is arguably present, the more important and telling inquiry is whether the regulation substantially advanced the goal of rent control. More than a "logical and well founded" relationship must be shown. However, no such "substantial advancement" is demonstrated here and in fact, was not found in Steinbergh I. Indeed, even the court in Steinbergh II admits that all that was produced by the subsection was an "incremental enforcement advantage of the regulation" which "was too little to constitute a necessary provision for

regulating unlawful occupation of rent-controlled units." Steinbergh II, supra at 747; 604 N.E.2d at 1277.

In effect, after comparing Steinbergh I and Steinbergh II it is apparent that the Massachusetts court concluded that the standard for determining whether an ordinance is "necessary" to the enforcement of a statutory scheme is a stricter standard than whether an ordinance "substantially advances" a statutory scheme. This method of analysis is backward and directly contrary to the Nollan decision.

In addition, the language used, clearly demonstrates that in Steinbergh II the court, despite language to the contrary, simply examined the relationship of subsection c 1/2 to rent control under a

"rationally related" standard. Nowhere does the opinion demonstrate that rent control was "substantially advanced" by restricting bulk sales. In short, an unnecessary incremental advancement of rent control cannot be deemed to be a substantial advancement. The court, despite its pronouncement, has only found a rational relationship. The decision fails the constitutional test.

There is a second, fundamental flaw in the court's analysis which is whether the subsection advanced a legitimate governmental interest. If the real governmental interest being served by the subsection had been rent control that interest might have sufficed. Yee v. City of Escondito, _____ U.S. _____; 112 S.Ct. 1522, 1529 (1992); Pennell v. City of San

Jose, 485 U.S. 1, 12 (1988). However even the Massachusetts court recognized that the subsection did "absolutely nothing to change the rent control status of the units whose sale it regulates." Steinbergh I, supra at 152; 546 N.E.2d at 172. The relationship between rent control and the subsection was characterized in that decision as "minimal". Id. at 155; 546 N.E.2d at 174.

The real governmental purpose served by the subsection was to prevent "the owners of rent-controlled condominium units (from) unlawfully occupying them by various devices." Steinbergh I, supra at 149; 546 N.E.2d at 171. The goal of the subsection was to eliminate "one circumstance by which people had been illegally (owner) occupying rent-controlled condominium units."

Steinbergh II, supra at 746-747; 604 N.E.2d. 1269. The true purpose of subsection c 1/2 was to preclude owner-occupancy so that owners would be forced to rent their apartments as required under Ordinance section 1(b)(4)(v).

The problem, in a constitutional sense, is that neither precluding owners from occupying their own property nor forcing them to rent is a legitimate governmental interest. It is well established that governmental regulations or actions which terminate an owner's right to exclude third parties constitute a per se taking. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419; 435-436 (1982). This prohibition extends to governmental action which eliminates the right to exclude the general public. Kaiser

Aetna v. United States, 444 U.S. 164 (1979); Nollan, supra at 832. In Yee, supra, this Court reaffirmed this conclusion and was explicit that if a rent control ordinance required an owner to rent property, the ordinance would amount to a "compelled physical occupation giving rise to a right to compensation..." Id. at 1530-1531. Such a law would amount to a per se taking requiring compensation even if the economic impact were "minimal." Loretto, supra at 434-435.[3]

---

[3] Chief Justice Rehnquist has previously expressed his belief that the Cambridge Ordinance "effected a permanent physical invasion" in violation of the Fifth and Fourteenth Amendments.

This conclusion is based upon the clearly established doctrine that property rights in a physical thing are "the right to possess, use and dispose of it." Loretto, supra at 435, citing United States v. General Motors Corp., 323 U.S. 373, 378 (1945). In addition "the right to exclude [others is] one of the most essential sticks in the bundle of rights that are commonly characterized as property." Nollan, supra at 831; citing Loretto, supra at 433; quoting Kaiser Aetna, supra at 176. As this Court suggested in Yee, a statute that requires

---

Fresh Pond Shopping Center, Inc. v. Callahan, 464 U.S. 875, 877, appeal dismissed, (1983) (Rehnquist, J., dissenting).

an owner "to rent his property or to refrain in perpetuity from terminating a tenancy" may constitute a physical taking. Yee, supra, at 1529. See also Seawall Associates v. City of New York; 74 N.Y. 2d. 92; 544 N.Y.S. 2d 542; 542 N.E. 2d 1059; cert. denied, 493 U.S. 976 (1989) (mandatory rental requirement a per se physical taking).

It has been well established that government has no right, unless compensation is paid, to require that owners either suffer the intrusion of others upon their property or be precluded from occupying the property owned. It is impossible, in light of these well-reasoned and well-established precedents, to conclude that subsection c 1/2 did not effect a taking. The sole purpose of the

subsection was to impermissibly prevent owner-occupancy and therefore force owners to comply with the similarly impermissible requirement that they suffer tenancies they do not want. There can be no "legitimate governmental purpose" in requiring owners to surrender long-protected property rights without compensation.

Thus, subsection c 1/2 failed the Nollan constitutional formula in two ways. First, the subsection failed to substantially advance the Act's stated governmental interest - the control of rents and evictions. Second, the governmental interests it purported to serve - the mandatory exclusion of owners from their property and the mandatory rental of those properties - are not "legitimate" unless compensation is paid.

The Massachusetts court, with its conclusions to the contrary, is in error.

THE MASSACHUSETTS DECISION IS IN DIRECT CONFLICT WITH THE DECISIONS OF SEVERAL UNITED STATES COURTS OF APPEALS AND SEVERAL STATE COURTS OF LAST RESORT REGARDING THE LEVEL OF JUDICIAL SCRUTINY TO BE APPLIED IN REGULATORY TAKINGS CASES.

Supreme Court Rule 10(.1) provides in part as follows:

> A petition for a writ of certiorari will be granted only when there are special and important reasons therefor.

Rule 10(.1)(b) contains the following example of a type of "special and important" reason which will be considered:

> When a state court of last resort has

decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

The petitioners contend that a regulation affecting rights in real property must meet the criteria set out in Nollan to avoid being an uncompensated taking of property. Therefore, any such regulation must "substantially advance a legitimate state interest" to avoid the compensation requirement. Nollan, supra at 834. Furthermore, petitioners read Nollan as requiring a higher level of scrutiny from that utilized in due process or equal protection cases to determine if the constitutional command has been met. Though petitioners dispute whether the Nollan test was properly used by the

Massachusetts Supreme Judicial Court in Steinbergh II (see Argument, supra), the court did opine that the "substantial advancement" test was appropriate in this case, where it was claimed that a regulation resulted in a non-physical "taking". Steinbergh II, supra at 746; 604 N.E.2d at 1276. The position is at odds with many federal and state courts.

This conflict is pointed out in Steinbergh II itself where a citation to Commercial Builders of Northern California v. Sacramento, 941 F.2d 872, (9th Cir. 1991), cert. denied, _____ U.S. _____, 112 S. Ct. 1997 (1992) notes that the Ninth Circuit has rejected the argument that Nollan materially changed the level of scrutiny to be applied to non-physical takings cases. Steinbergh II, supra at

745, n. 8, 604 N.E.2d at 1276.

Commercial Builders, in turn, notes that three other circuits appear to have rejected the proposition that Nollan changed the level of scrutiny in non-physical takings cases. St. Bartholomew's Church v. City of New York,, 914 F.2d 348, 357 n. 6 (2d Cir. 1990), cert denied, sub nom., Committee to Oppose Sale of St. Bartholomew's Church v Rector, ____ U.S. ____, 111 S.Ct. 1103, (1991); Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737 (5th Cir.1988); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir.1988). Commercial Builders suggests that the Nollan standard applies only to physical takings cases. This is particularly erroneous since this Court has repeatedly

held that in cases of permanent physical occupation neither public benefit nor minimal economic impact obviates the compensation requirement. Nollan, supra at 831-832; Loretto supra at 434-435. In any event, a conflict between the Massachusetts view and these four circuits now exists.

At least one other circuit would also appear to be in conflict. In Reahard v. Lee County, 968 F.2d 1131 (11th Cir. 1992), the court denied that the Nollan substantial advancement test is ever used in "just compensation" cases. In Reahard, the court held that any "claim for 'just compensation'... necessarily involves a regulation that substantially advances a legitimate government interest..." and that such claims "admit and assume that the subject regulation substantially advances a

legitimate government interest." Id. at 1136. Therefore, according to the Reahard court, the "only issue in just compensation claims" is whether an owner has been denied all use of his property. Id. This holding is at wide variance both with Massachusetts and the other circuits as well as with the pronouncements of this Court.

The Steinbergh II decision is also in conflict with numerous state courts.

The Connecticut Supreme Court in Builders Service Corp. v. Planning and Zoning Commission of the Town of East Hampton, 205 Conn. 267; 545 A. 2d 530 (Conn. 1988), held that Nollan does not apply in zoning cases. The court then applied a rational basis standard in determining a challenge to a minimum foot-area ratio ordinance.

The Indiana Supreme Court in Department of Natural Resources v. Indiana Coal Council, Inc., 542 N.E. 2d 1000 (Ind. 1989), when analyzing the effect of the state's restrictions on mining in an archaeologically sensitive area, noted that the Nollan case had not mandated a change in the level of scrutiny for regulatory takings claims or, at most, only required enhanced scrutiny when a governmentally mandated conveyance was involved.

Mississippi has also rejected the "substantial advancement" test. In Saunders v. City of Jackson, 511 So. 2nd 902 (Miss. 1987), the Mississippi Supreme Court, reviewing a zoning denial case, opined that the Nollan decision did not require an analysis of a city's actions beyond the question of whether the actions

were "arbitrary, capricious or unreasonable or whether...[they were] fairly debatable." Saunders at 907, n. 3.

North Carolina has also failed to follow Nollan in a case concerning land development. In River Birch Associates v. City of Raleigh, 326 N.C. 100; 388 S.E.2d 538 (N.C., 1990), a case concerning an ordinance provision that an owner convey certain common areas to a homeowners association, the court, citing Nollan and North Carolina law, found no taking where the ordinance had a "rational relation" to the stated open space goal and was "reasonably related" to that goal. Id. at 121; 388 S.E.2d. at 550.

North Dakota also appears to have misinterpreted Nollan. In Grand Forks - Traill Water Users, Inc. v. Hjelle, 413

N.W.2d 344 (N.D. 1987), appeal dismissed, 484 U.S. 1053 (1988), the court opined that Nollan was not applicable to a case involving a state highway setback law. In its reasoning the court found the Nollan analysis unhelpful since the case at bar was not a "permanent physical occupation" case. Grand Forks, supra at 347-348.

Finally, in Oregon, in McKay Creek Valley Assoc. v. Washington County, 114 Or. App. 95; 834 P.2d 482 (Or. App. 1992), the court rejected a takings claim when the building of a farm dwelling was conditioned on a provision that the parcel be " planted in perennials capable of producing upon harvest, an average of at least $10,000 in gross annual income." Id. at 97; 834 P.2d at 483. The court rejected a takings claim under Nollan and held that the proper Fifth

Amendment test was whether the "exaction" bears a reasonable relationship to the impacts and public needs that are created by the activities regulated. Id. at 100; 834 P.2d at 485.

The Massachusetts formula is in sharp contrast to that used by the noted federal courts and many of the states as noted above. In this case, which did not directly involve a physical taking, the court formulates the test as "whether the regulation advanced the object of rent control and did so substantially" Steinbergh II, supra at 746; 604 N.E.2d at 746. The court appears to reject but actually applies the erroneous conclusion found in Commercial Builders et al that in a non-physical taking case a higher standard of scrutiny is not required. The

Massachusetts decision, taken at its word, is in direct conflict with the methodology used by the lower federal courts and numerous other states. This conflict can only be resolved by this Court.

CONCLUSION

For the above stated reasons the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

Patricia Randall
Hamilton, Dahmen & Randall
73 Tremont Street
Boston, MA 02108
(617) 523-3716
Counsel of Record

Frederick B. Hayes, III
HAYES, CLARK, HUNT & EMBRY
43 Thorndike Street
Cambridge, MA 02141
(617) 494-4800

APPENDIX A

Alex Steinbergh & another[1], trustee[2], vs. CITY OF CAMBRIDGE & another.[3]

Middlesex. September 15, 1992 - December 10, 1992.

Present: Liacos, C.J., Wilkins, O'Connor & Greaney, J.J.

Due Process of Law, Taking of property, Rent Control.
Constitutional Law, Taking of property, Equal protection of laws, Rent Control.
Municipal Corporations, Rent control.
Real Property, Condominium. Judgment, Preclusive effect. Regulation.
Rent Control, Damages.

Civil action commenced in the Superior Court Department on February 9, 1990.

The case was heard by Wendie I. Gershengorn, J., on motions for summary judgment.

The Supreme Judicial Court granted a

---

1 R. Stanley Bowden.

2 Of 16 Chauncy Trust.

3 Rent Control Board of Cambridge. We shall refer to the defendants collectively as the "city."

request for direct appellate review.

Frederick B. Hayes, III, for the plaintiffs.

Thomas J. Urbelis (Devra G. Bailin with him) for the defendants.

WILKINS, J. In Steinbergh v. Rent Control Bd. of Cambridge, 406 Mass. 147 (1989) (Steinbergh I), this court held that the city of Cambridge lacked authority to adopt a particular ordinance provision intended to discourage the unlawful removal of rent-controlled housing units from the rental market. That provision, a subsection of the city's ordinance concerning the removal of rent-controlled properties form the market, purported to restrict the sale of individual condominium units by a property owner owning more than one condominium unit in a building. The

ordinance provision denied such an owner the right to sell individual condominium units unless the rent control board of Cambridge (board) granted a removal permit or the tenant had an exemption certificate. See id. at 148 n.4, for the specific provision.

In this action, commenced on February 9, 1990, the same plaintiff property owners who were involved in Steinbergh I seek an award of damages against the city on the theory that the city's unlawful restriction on their right to sell individual condominium units was unconstitutional and deprived them, to their financial detriment, of the right to sell individual condominium units from September 14, 1987 (the date the board denied the plaintiffs'

application for removal permits) until November 20, 1989 (the date this court's opinion in Steinbergh I was released invalidating the challenged portion of the ordinance).

The plaintiffs' principal contention is that the city's application to their property of the challenged ordinance provision constituted an uncompensated, temporary regulatory taking of property in violation of art. 10 of the Massachusetts Declaration of Rights and the Fifth Amendment to the Constitution of the United States, applicable to the States through the Fourteenth Amendment. Chicago, B. & Q. R.R. v. Chicago, 166 U.S. 226, 241 (1897). The plaintiffs further claim a denial of due process of law under the State and

Federal Constitutions and a denial of equal protection of the laws under the Constitution of the United States.

Our discussion of these issues will focus on the claimed violations of the Constitution of the United States. The plaintiffs do not argue that, acting under the Constitution of the Commonwealth, this court should apply any principle different from that established by the United States Supreme Court. In considering whether economic regulations satisfy due process, we have established no substantially different guiding standards under the Commonwealth's Constitution than the Supreme Court has established under the Constitution of the United States. See Opinion of the Justices, 408 Mass. 1215,

1217-1218 (1990); Blue Hills Cemetery, Inc. v. Board of Registration in Embalming & Funeral Directing, 379 Mass. 368, 373 n.8 (1979). Although a similarity in standards under the "takings" clauses of the two Constitutions has not been as clearly established, the plaintiffs have advanced no reason why we should create takings principles more favorable to them than those developed under the Federal Constitution.

The case was heard below on cross motions for summary judgment.[4] The city contended that the judgment entered in Steinbergh I barred the plaintiffs' claims

---

[4] The plaintiffs sought judgment in their favor on the issue of liability only.

for damages and that, in any event, as a matter of law there had been no uncompensated taking or other constitutional violation. There appears to be no dispute of material fact. The motion judge rejected the city's argument that the plaintiffs were barred by the earlier judgment from presenting their constitutionally-based claim for damages but agreed with the city that its conduct did not amount to a taking or to a denial of due process of law or equal protection of the laws. We allowed the plaintiffs' application for direct appellate review of the judgment entered in the city's favor. We affirm the judgment.

The city's rent control regulations are authorized by St. 1976, c. 36. The

provision in the city's regulations whose effect is in controversy here was adopted on June 29, 1981. The plaintiffs purchased the fifty-three condominium unit property at 16 Chauncy Street on August 1, 1986. On September 14, 1987, the board ruled that the challenged regulation barred the plaintiffs from selling individual condominium units without permission from the board. During the period from September, 1987, to November, 1989, the plaintiffs received net income from the property of approximately $120,000. After Steinbergh I was decided in November, 1989, the plaintiffs sold thirty-six units to individual buyers and on December 31, 1989, they still owned seventeen units. The plaintiffs assert that the market value of

their condominium units declined between September, 1987, and November, 1989, and seek recovery from the city for their losses, which they allege to be approximately $374,000.

1. The judge was correct in concluding that this action was not foreclosed by the judgment entered in Steinbergh I. The plaintiffs' claim for damages for a temporary regulatory taking is precluded only if their damage claim was or should have been adjudicated in Steinbergh I. Heacock v. Heacock, 402 Mass. 21, 23 (1988).

The damages claim was not adjudicated in Steinbergh I. The plaintiffs' amended complaint in Steinbergh I, which was an action for judicial review of the board's

determination, pursuant to St. 1976 c. 36 § 10, did not seek damages for a temporary taking of their property or for any other constitutional violation. That is hardly surprising in an appeal from the decision of an agency that had no authority to award damages. The amended complaint alleged that, in ruling that the regulation applied to the plaintiffs, the board acted in excess of its statutory authority and, in various other ways, in violation of law (including in violation of the State and Federal Constitutions). By that complaint, the plaintiffs sought a ruling that they were exempt from the challenged ordinance provision, but they made no allegation or prayer concerning an award of damages because of a taking of property or other

constitutional violation. Indeed, a precise determination of damages prior to a final ruling that the regulation was invalid and that a damage award was appropriate would not have been possible.

The plaintiffs were not obliged, at their peril, to include in Steinbergh I a claim for damages based on constitutional violations. Steinbergh I was an appeal governed by G.L.c. 30A and based on the agency record. This court expressly did not reach the plaintiffs' constitutional challenges to the regulation, after concluding that the regulation was beyond the rent board's authority. Steinbergh I, supra at 148. The plaintiffs were not reasonably able to seek damages until the basis for their takings claim was

established. Only after the regulation was ruled unlawful could the plaintiffs determine precisely whether the delay had caused them any harm. A regulatory takings claim often is not mature until the validity of the challenged local regulation has been determined. See Corn v. Lauderdale Lakes, 904 F.2d 585, 587 (11th Cir. 1990). Claim preclusion principles do not reach such a contingent claim so as to require that it be asserted in the first action, if it is to be asserted at all.

2. The city did not make a taking of property for which the plaintiffs are entitled to compensation under the takings clauses of the State and Federal Constitutions. The general concept that a government regulation that "goes too far"

is a taking was expressed seventy years ago. See Pennsylvania Coal Co v. Mahon, 260 U.S. 393, 415 (1922). The problem over the years has been to define how far "too far" is. When the claim is that government conduct, not amounting to a permanent physical occupation or confiscation of property, involves a regulatory taking, the analysis is peculiarly fact dependent, involving "essentially ad hoc, factual inquiries." Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978). See Yankee Atomic Elec. Co. v. Secretary of the Commonwealth, 403 Mass. 203, 209 (1988).

The alleged taking does not fall within either of the two categories of governmental regulatory action that constitute compensable takings without

regard to other considerations, such as the public interest sought to be advanced. See Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2893 (1992). First, the challenged regulation did not authorize, direct, or otherwise involve a physical intrusion into the plaintiffs' property. See Nollan v. California Coastal Commission 483 U.S. 825, 831 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 432-433 n. 9 (1982); Fragopoulos v. Rent Control Bd. of Cambridge, 408 Mass. 302, 309 (1990). Second, the challenged regulation did not deny all economically beneficial or productive use of the plaintiffs' interest in the property. See Lucas v. South Carolina Coastal Council, supra at 2893-2895; Agins v. Tiburon, 447

U.S. 255, 260 (1980). The plaintiffs collected rents while they pursued their challenge to the regulation; they received a return on their investment during that time; and they could seek rent adjustments in order to obtain "a fair net operating income for such units" (St. 1976, c. 36, § 7 [a]). This is not, therefore, a case in which a local regulation denied all use of the affected property while the lawfulness of a regulation was being challenged. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 321 (1987) (landowner who successfully challenges, as a temporary taking, land use regulation that denies all use of its property may recover damages

incurred while challenge is pending.) [5]

If the governmental regulation neither results in a physical invasion of the property nor deprives a landowner of all economically beneficial use of land, there may nevertheless be a regulatory taking based, in part, on the regulation's economic impact on the property as a whole and the extent to which the regulation has interfered with a property owner's distinct

---

[5] The opinion of the Court of Appeals of New York in Seawall Assoc. v. City of N.Y., 74 N.Y.2d 92, cert, denied, 493 U.S. 976 (1989), on which the plaintiffs rely, provides no guidance on the proper disposition of this case. For example, there the cumulative effect of the local regulations amounted to a denial of economically viable use of the regulated property. Id. at 108-110.

investment-based expectations.[6] See Penn

---

[6] We shall assume that this principle applies to an alleged temporary regulatory taking in the same manner that it applies to an alleged permanent regulatory taking. The United States Supreme Court's Fifth Amendment takings principles concerning permanent takings are applicable to regulatory conduct that temporarily denies a landowner all use of his property. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304, 318 (1987). That Court has not explicitly stated, however, what principles apply when a temporary regulatory taking does not deny all economically beneficial use of property. There is authority that the two situations differ for takings purposes. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 210 Cal. App. 3d 1353, 1367 (1989), cert. denied. 493 U.S. 1056 (1990); Shopco Group v. Springdale, 66 Ohio App. 3d 702, 707-708 (1990). But see Poirier v Grand Blanc Township, 167 Mich. App. 770, 772, 777 (1988) (Michigan

Cent. Transp. Co. v. New York City, supra at 124-125, 130-131; Flynn v. Cambridge, 383 Mass. 152, 160 (1981). Cf. Wheeler v. Pleasant Grove, 664 F.2d 99, 100 (5th Cir. 1981), cert. denied, 456 U.S. 973 (1982) (ordinance that confiscated landowners' right to construct previously authorized apartment complex is an unconstitutional taking). The challenged regulation did not interfere with the plaintiffs' investment-based expectations. They acquired the property when the regulation was already in effect. See Fragopoulos v. Rent Control Board of Cambridge, supra at 308. The price that they paid for the property should have reflected whatever adverse

---

Constitution).

impact the regulation had on the fair market value of the property. See Flynn v. Cambridge, supra at 160. Moreover, if, as seems reasonably inferable, their investment expectations were based on the ultimate invalidation of the regulation in a judicial proceeding, the plaintiffs' investment expectations had to reflect the anticipated delay in the litigation process.[7]

---

[7] It should not be assumed that we would reach a different result if a challenge were advanced by one who had acquired an interest in rent-controlled condominium units before the adoption of the regulation. Compare Flynn v. Cambridge, 383 Mass. 152, 160-161 (1981) (local regulation barring owner of rented condominium unit from occupying it does not constitute taking, even as to one owning and renting unit when regulation enacted), with Polednak v. Rent Control Bd. of Cambridge,

In considerable measure, the delay to which the plaintiffs were subject is the same kind of delay that commonly occurs in seeking regulatory approvals or changes in local ordinances and by-laws, which are government-imposed processes that have not traditionally been viewed as constituting regulatory takings. See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, supra at 321 ("We .

---

397 Mass. 854, 861-862 (1986) (taking involved if ordinance were to be applied retroactively to thwart condominium unit owner's primary expectation of continuing to occupy it after she bought it). See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 136 (1978) ("the [local regulation] does not interfere with what must be regarded as [the landowner's] primary expectation concerning the use of the parcel").

. . of course do not deal with the quite different questions that would arise in the case of normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like which are not before us"); Bello v. Walker, 840 F.2d 1124, 1126 (3d Cir.), cert. denied, 488 U.S. 851, 868 (1988) ("absent extraordinary circumstances not presented by this case, [even lengthy] delays in issuing a building permit do not result in a 'taking'"). Cf. Wilson v. Commonwealth, 414 Mass. 352, 355 (1992) (unreasonable agency delay in processing application could possibly be regulatory taking, where delay caused total destruction of the property). The fact that the plaintiffs could not make immediate optimum use of their property

(and thus were unable to sell the units at prices higher than those at which they could sell them after the regulation was invalidated) does not constitute a taking. See Andrus v. Allard, 444 U.S. 51, 66 (1979); Flynn v. Cambridge, supra at 160-161.

It is, of course, true that in this case the delay was caused, not by the necessity of obtaining mandated governmental approvals, but by the process of presenting a judicial challenge to a municipal regulation. That legal challenge resulted in invalidation of the regulation as beyond the authority of the city to adopt, but not because the municipal regulation was unconstitutional as violating rights to due process or equal

protection of the laws. Steinbergh I, supra at 148. The plaintiffs make no reasoned argument that, simply because a municipal regulation is not authorized by law, there is a compensable temporary taking of property, even though the regulation restricts the sale of reduces the market value of the property until the regulation is successfully challenged in court. See Estate of Himelstein v. Fort Wayne, 898 F.2d 573, 576-577 n.4 (7th Cir. 1990) (delay attributable to legal challenge to zoning laws not a taking of property).

The plaintiffs make an entirely separate takings argument based on the principle that a taking occurs when a land-use regulation "does not substantially

advance legitimate state interests." Agins v. Tiburon, 447 U.S. 255, 260 (1980). In Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-835 (1987), the Court observed that "a broad range of governmental purposes and regulations satisfies these requirements." The Court also noted that its "cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter." Id. at 834. The plaintiffs do not argue that the control of rents in Cambridge through local regulation is not a legitimate state interest. They focus

rather on the requirement that a land-use regulation must substantially advance a state interest, and argue that the restriction on the sale of their condominium units as individual units did not substantially advance the administration of the Cambridge Rent Control law.

The requirement that a regulation substantially advance the state interest may express a higher standard at least in certain circumstances than the rational basis test commonly applicable in deciding whether an exercise of the police power satisfies due process or equal protection

requirements. Id. at 834 n.3.[8] It may be that the degree of substantially required varies depending on the character of the state's interest in relation to the reduction that the local regulation causes in the value and quality of the affected property. See id. at 841.[9] L. Tribe,

---

[8] But see Commercial Builders of N.Cal. v Sacramento, 941 F.2d 872, 874 (9th Cir. 1991), cert. denied, 112 S. Ct. 1997 (1992) (rejecting argument that Nollan materially changes level of scrutiny; no Circuit Court of Appeals has interpreted Nollan "as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land").

[9] Regarding the phrase "substantial advanc[ing]", the Court stated, "We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a

American Constitutional Law § 9-4, at 599 n.20 (2d ed. 1988). In the case before us, unlike the Nollan case, the city has not attempted to acquire an interest in land at no cost to the public, nor has Cambridge sought to regulate the plaintiffs' property for a reason that has no connection

---

land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." (Emphasis in original.) Nollan v. California Coastal Comm'n, 483 U.S. 825, 841 (1987). The Nollan case involved a condition that landowners convey an easement across their property in order to obtain a permit to construct a dwelling. The Court concluded that the governmental purpose in requiring the grant of an easement was not the same as the governmental purpose in regulating construction of the dwelling, and thus there was a taking. Id. at 836-842.

whatever with the reason for rent control.

Under traditional principles, the burden is on the plaintiffs to demonstrate that the regulation fails to meet the constitutional standard (that is, substantially advance the regulation of rents in the city). They rely heavily on language in this court's opinion in Steinbergh I. There we were concerned with whether the regulation was necessary to the operation of the rent control law, in which case the city would have had implied authority to adopt it. Steinbergh I, supra at 151. The city had express authority to regulate rents but only such authority to regulate the removal of units from rent control as was necessary to regulate rents. We concluded that the ordinance provision

barring an owner of a group of condominium units from selling individual condominium units separately was not necessary for that purpose. Thus the city had no implied authority to adopt it. In the case before us, the standard is not one of necessity. The test is rather whether the regulation advanced the objects of rent control and did so substantially.[10]

We conclude that the challenged ordinance substantially advanced the purpose of rent control. We may rely on information available to the city council

---

[10] The plaintiffs, we think rightly, do not contend that a local land use regulation that is ultra vires cannot, as a matter of law, be viewed for takings purposes as substantially advancing a state interest.

at the time of its enactment of the regulation.[11] Here the legislative record, which includes a May 28, 1981, report to the city council, indicated that owners of rent-controlled condominium units were unlawfully occupying them by various

---

[11] It is not clear that for this purpose we may properly attribute to the city council any apparent reasonable ground for its action, at least if that action is not contradicted by facts established on the summary judgment record. Cf. Commonwealth v. Henry's Drywall Co., 366 Mass. 539, 541 (1974) (all rational inferences are made in favor of legislation whose constitutionality is challenged on due process and equal protection grounds). Accord Matter of Tocci, 413 Mass. 542, 549 (1992). We would be unwilling to attribute to a government agency a reason for its action that is inconsistent with its stated reasons for its action. See Nollan v. California Coastal Comm'n, supra at 840.

devices. The task of monitoring the occupancy of newly-sold units was "an intrusive and impossible task" and financially burdensome. The report states further that evidence supports a presumption that "developer sales are tantamount to removal from the rental market." By permitting the sale of rent-controlled condominium units only as a group, except a sale to a current tenant or when the board grants a removal certificate, the ordinance provision eliminated one circumstance by which people had been illegally occupying rent-controlled condominium units. The elimination, through the adoption of an economically feasible restriction, of conditions that created a substantial risk

of difficult-to-discover violations of an aspect of the rent control law substantially advanced the operation of the Cambridge rent control law.[12] The

---

[12] After Steinbergh I had been decided, by St. 1990 c. 52, § 2, in language substantially identical to the challenged regulation, the Legislature enacted a restriction on the sale of individual units by an owner of a Cambridge building with condominium units. In § 1 of the act, the General Court made legislative findings to the effect that (a) it was necessary to regulate the removal of controlled rental units from the market, (b) the city's existing powers to regulate such removals had proven inadequate, (c) since Steinbergh I, "hundreds of individual condominium units have been transferred or sold thereby creating a substantial risk of the removal of controlled rental housing units from the rental market, and "(d) [i]n order to regulate such removals effectively, it is necessary to regulate the sale of condominium units by the owners of rent controlled

incremental enforcement advantage of the regulation was sufficient to satisfy the constitutional standard. Although in Steinbergh I that advantage was too little to constitute a necessary provision for regulating unlawful occupation of rent-

---

buildings, for the reasons stated in the Report of the Cambridge City Council Committee on Rent Control dated May 28, 1981.

Although these findings made after the adoption of the challenged ordinance provision are not supportive legislative history, the do justify a judicial conclusion that the ordinance substantially advanced the operation of the Cambridge rent control law. These findings also make no longer correct the dicta in Steinbergh I that the challenged regulation had "minimal" logical connection to preserving Cambridge's rental housing stock. See Steinbergh v. Rent Control Bd. of Cambridge, 406 Mass. 147, 155 (1989)

controlled units, it was nevertheless a "logical and sufficiently well-founded approach to dealing" with the problem for us to find, under the Nollan case, that the "essential nexus" between "the State's interest and its chosen means is present in this case." Esposito v. South Carolina Coastal Council, 939 F.2d 165, 169 (4th Cir. 1991), cert, denied, 112 S. Ct. 3027 (1992) (prohibition on building seaward of setback line not taking when adopted to ameliorate beachfront erosion).

3. We need not discuss at length the plaintiffs' claims that they were denied due process of law and equal protection of the laws. In light of our conclusion that the challenged regulation substantially advanced the object of rent control in

Cambridge, it is apparent that the regulation satisfied the due process requirement that a law have foundation in reason and not be an exercise of power not rationally related to a valid legislative purpose. See Smithfield Concerned Citizens for Fair Zoning v. Smithfield, 907 F.2d 239, 243-244 (1st Cir. 1990). See also Commonwealth v. B.& W. Transp. Inc., 388 Mass. 799, 805, appeal dismissed sub nom. Burke Distrib. Corp. v. Massachusetts, 464 U.S. 957 (1983); Gilbert v. Cambridge, 932 F.2d 51, 65-66 (1st Cir.), cert. denied, 112 S. Ct. 192 (1991). The facts that the regulation was ruled to be beyond the city's authority to enact and that the plaintiffs suffered a financial loss because they could not sell individual

condominium units while their judicial challenge was in process do not amount to a denial of substantive due process. There is no claim that the city acted in bad faith or with some other improper animus. The regulation was of general application and adopted before the plaintiffs purchased their property.

For reasons already given, there was a rational basis, for equal protection of the laws purposes, in limiting the sale of individual condominium units by a multiple owner and not doing so as to an owner of only one condominium unit. The purpose was not to restrict sales of a person's investment in one or more condominium units but to reduce the illegal occupation of rent controlled units by persons purchasing

such units. The two classes of owners were treated equally because members of each class were free to sell their entire ownership interests.

Judgment affirmed.

APPENDIX B

ALEX STEINBERGH & another[1], trustees[2] vs. RENT CONTROL BOARD of CAMBRIDGE & others. [3]

Middlesex. October 4, 1989. - November 20, 1989.

Present: Liacos, C.J., Wilkins, Nolan, Lynch, & Greaney, J.J.

Municipal Corporations, Rent Control. Real Property, Condominium. Rent Control, Removal of unit from market. Cambridge.

The city council of Cambridge exceeded the authority conferred on it by St. 1976, c. 36, when it adopted an amendment to the city's rent control ordinance providing that no owner of a controlled condominium unit or units may sell less than his entire interest in such unit or units without first obtaining a removal permit from the rent control board. [149-155]

CIVIL ACTION commenced in the Superior Court Department on October 9, 1987.

The case was heard by Edward M.

---

[1] R. Stanley Bowden.

[2] Of Sixteen Chauncy Trust.

[3] The residents of the building at 16 Chauncy Street in Cambridge.

Ginsburg, J. The Supreme Judicial Court granted a request for direct appellate review.

Frederick B. Hayes, III for the plaintiffs.

Patricia A. Cantor (Carol Wagner with her) for Rent Control Board of Cambridge.

James M. Shannon, Attorney General, Robert L. Bowens, Evelynne L. Swagerty & Harvey D. Cotton, Assistant Attorneys General, for the Commonwealth, amicus curiae, submitted a brief.

Philip S. Lapatin, for Greater Boston Real Estate Board, amicus curiae, submitted a brief.

Jeffrey W. Purcell, for Massachusetts Tenants Organization & another, amici curiae, submitted a brief.

GREANEY, J. The plaintiffs, trustees of a fifty-three unit building at 16 Chauncy Street in Cambridge which has been converted to condominium units, appeal from a summary judgment of the Superior Court. That judgment upheld a decision of the rent control board of Cambridge (board) which

determined that sales of individual condominium units within the building are subject to subsection c 1/2 of § 1[4] of

---

[4] This specific provision is entitled "Prohibited acts by developers" and reads as follows: "After August 1, 1981, no owner of a building for which a condominium master deed has been recorded shall directly or indirectly sell, or offer for sale,or agree to sell any controlled rental unit therein, unless the Board has granted a removal permit for that unit, or unless the sale or offer is to, or the agreement is with, a current tenant of the unit who holds an exemption certificate. The Board shall issue an exemption certificate to any person who files with it an affidavit in a form prescribed by the Board, stating that he is a current tenant of the unit, that he occupied it as a tenant before August 10, 1979, and that he intends in good faith to occupy it indefinitely as its owner. No person shall file a false affidavit under this subsection. Nothing in this subsection shall prevent an

Cambridge Ordinance 966 which regulates the "Removal of Controlled Rental Units from Market" (hereafter subsection c 1/2). The plaintiffs make several arguments that subsection c 1/2 is invalid. We agree with their contention that subsection c 1/2 exceeds the board's authority in the rent control area, and, as a consequence, is invalid. This conclusion renders it unnecessary to consider the other points argued.

This litigation is the latest in a long series of disputes surrounding the

---

> owner of a building or any portion thereof from conveying his entire interest in the building in good faith to one purchaser, who shall then be subject to the provisions of this subsection to the same extent as the original owner."

establishment and operation of rent control ordinances in various communities of the Commonwealth. See, e.g. Perry v. Boston Rent Equity Bd., 404 Mass. 780 (1989); Greater Boston Real Estate Bd., v. Boston, 397 Mass. 870 (1986); Bannerman v. Fall River, 391 Mass. 328 (1984); Flynn v. Cambridge, 383 Mass. 152 (1981); Grace v. Brookline, 379 Mass. 43 (1979). The instant chapter begins with the enactment of St. 1976, c. 36 (Rent Control Act), a special statute which granted Cambridge the power to continue controlling rents and evictions.[5]

---

[5] Cambridge first enacted rent and eviction control ordinances based upon the authority conferred by St. 1970, c. 842. That statute, which applied to all cities and towns with populations in excess of

After several years of rent and eviction controls had apparently proven insufficient to preserve its stock of affordable rental housing, Cambridge turned its attention toward regulating removal of controlled units from the rental housing market. In 1979, the city council of Cambridge (city council) adopted § 1 of c. 23 of the Cambridge City Code, Ordinance 966 (ordinance). Section C of the ordinance provides that "[n]o owner or other person shall remove from the market any controlled rental unit, unless the

---

50,000, lapsed in 1976, and was not renewed. The Legislature, reacting to its perception that "a serious public emergency exists with respect to the housing of a substantial number of citizens in the City of Cambridge." then enacted St. 1976, c. 36.

Board after a hearing grants a permit." "Removal from the market" is defined to include occupancy of a controlled condominium unit by its owner, if the last previous occupant was a tenant. Id. at § b (4)(i). Thus, the ordinance generally prevents the legal owner occupancy of controlled condominium units in Cambridge.

In Flynn v. Cambridge, 383 Mass. 152 (1981), we upheld the ordinance against a challenge that Cambridge lacked the authority to adopt it. While we implicitly found that St. 1976, c. 36 did not provide express authority for removal provisions such as those set forth in the ordinance, we held that the grant of express powers in that statute carried with it a grant of those implied powers necessary to

effectuate the statutory goals. One such implied power is the ability to regulate removal of controlled units from the rental housing market. Without this implied authority, we reasoned, "the power conferred by c. 36 to control rents would steadily and irreversibly be transformed into the power to control nothing." Id. at 159. We thus held that the power to regulate removals from the rental housing market was conferred by implication in the Rent Control Act. Id.

Despite the strict removal regulations imposed by the ordinance, the city council concluded that the city's housing stock still was not adequately protected. In particular, widespread owner occupancy of controlled condominium units was said to

exist, in direct violation of the ordinance. In an attempt to remedy this perceived problem, the city council amended the ordinance on June 29, 1981, by adding subsection c 1/2, the provision at issue in this case. The amendment provides that no owner of a controlled condominium unit or units shall sell anything less than his or her entire interest in such unit or units without first obtaining a removal permit from the board.[6] Subsection c 1/2 appears to rest on an assumption that sales of

---

[6] Subsection c 1/2 also permits sales of less than an owner's full interest if the buyer is a current tenant who has occupied the unit since August 10, 1979, and who holds an exemption certificate. This exception is not relevant to the facts in the case and does not affect our analysis of the appeal.

individual condominium units inevitably result in illegal owner-occupancy of those units.

The plaintiffs appealed to the superior Court pursuant to St. 1976, c. 36 § 10 (judicial review provision of Rent Control Act.) After stipulating that there were no genuine issues of material fact, the parties each moved for summary judgment pursuant to Mass. R.Civ. P. 56, 365 Mass. 824 (1974). The Superior Court judge granted the board's motion.

The plaintiffs desire to sell less than all of their fifty-three units at 16 Chauncy Street to individual investors. They requested a decision from the board stating that their property was exempt from subsection c 1/2. After conducting an

inquiry, a hearing examiner recommended that the plaintiffs' request be denied. The board accepted this recommendation, and concluded that the plaintiffs' units could not be individually sold.

We discern merit in the plaintiffs' argument that the city council lacked authority to adopt subsection c 1/2. Like any other municipality in this Commonwealth, Cambridge may exercise only those powers which have been affirmatively granted to it. See Atherton v. Selectmen of Bourne, 337 Mass. 250, 255-256 (1958). See also O.M. Reynolds, Local Government Law, § 49, at 135-136 (1982). Thus, in order for subsection c 1/2 of the ordinance to be upheld as valid, there must be some positive law source authorizing its

adoption.

The board relies primarily on the Rent Control Act, as providing the authority necessary to support the adoption of subsection c 1/2. [7] We previously have held that the ordinance can be supported only by implied authority granted in the Rent Control Act. See Flynn v. Cambridge, supra. Thus, subsection c 1/2, an amendment to the ordinance, can be supported, if at all, only by implication from the authority conferred by the Rent Control Act.

---

[7] The board does not seem to rely on the Home Rule Amendment, art. 89 of the Amendments to the Massachusetts Constitution, as Cambridge did in defending the ordinance in the Flynn decision. Id. at 155. Consequently, we have no occasion to address any home rule issues.

The standard we must apply in determining whether authority to adopt subsection c 1/2 is to be implied from the Rent Control Act is straightforward: such power exists only if it is "necessary" to carry the purpose expressed in the authorizing statute. See Flynn v. Cambridge, supra at 158; Greater Boston Real Estate Bd. v. Boston, 397 Mass. 870, 877 (1986). This standard appears in the Rent Control Act itself. See St. 1976, c. 36, § 5 (c) ("[t]he rent control board...shall recommend to the city, for adoption, such ordinances as may be necessary to carry out the purposes of this act"). Thus, subsection c 1/2 can be upheld as a valid exercise of implied statutory authority only if restrictions on

piecemeal sales of controlled condominium units are reasonably necessary to the preservation of the affordable rental housing stock in Cambridge.

Turning directly to the question presented, we have little trouble in concluding that the regulatory mechanism established in subsection c 1/2 is not necessary to the achievement of rent control objectives. We note initially, and most importantly, that subsection c 1/2 does absolutely nothing to change the rent control status of units whose sale it regulates. The plaintiffs, for example, own a structure containing fifty-three controlled condominium units. Those units are now controlled, and will remain subject to the exact same controls regardless

whether they are sold off as a block, individually, or anywhere in between. Subsection c 1/2 creates no change in legal status of the units to which it applies, let alone a change that can be deemed "necessary" to the furtherance of rent control objectives. Rather, it merely sets up another regulatory obstacle which owners must overcome before they legally may alienate their property.

The board set forth eight reasons in support of its contention that subsection c 1/2 is necessary to achieve the objectives of rent control. Of those eight, we find only two which possibly could support the rationale the board seeks: (1) that "[b]y allowing a court to enjoin illegal sales, offers, and agreements, [subsection c 1/2]

provides a meaningful civil remedy short of an order requiring an owner-occupant to vacate," and (2) that subsection c 1/2 "simplifies and reduces the cost of enforcement by limiting proof of violation to the recording of an initial unit deed after July 1, 1981, without the issuance of either a removal permit or an exemption certificate."[8] These claims amount to an

---

[8] The remaining six reasons put forth by the board - that subsection c 1/2 (1) does not further hurt condominium owner occupancy; (2) imposes a reasonable liability on developers; (3) protects innocent purchasers against unscrupulous developers; (4) clears future titles on resale; (5) prevents harassment of older and poorer tenants; and (6) prevents fragmented ownership of rental housing - are either at best only minimally relevant to the goals of the Rent Control Act or lack adequate substantiation in the

assertion that the extra layer of regulation added by subsection c 1/2 is absolutely necessary to facilitate the effective enforcement of other provisions of the ordinance.

We regard this "ease of enforcement" claim with suspicion, because we deem it an attempt by the board to extract a second level of derivative powers from the language of the Rent Control Act. The power to regulate removal at all, it will be recalled, is derivative of the power to regulate rents and evictions expressly granted in the Rent Control Act. The board now would have us hold that they also

---

record before us. We do not consider any of them sufficient to sustain subsection c 1/2.

possess additional implied authority to enforce a power that is itself a creature of implication. This, we conclude, impermissibly extends the legislative grant of power in the Rent Control Act beyond what its language reasonably will bear.

Furthermore, even if we were persuaded that enforcement considerations must furnish some basis for upholding subsection c 1/2, we are not convinced that the alleged enforcement advantages are so significant that they outweigh the interest of the owner in transferring ownership of his condominium to an investor. The crux of the board's argument is that subsection c 1/2 enables them to determine in advance whether a proposed condominium sale is likely to result in illegal owner

occupancy. To obtain the required removal permit, a potential buyer would have to appear before the board and convince it that his intention to maintain the unit as rental property was bona fide. If the board was not convinced, it simply would deny the required permit, and monitor the local registry of deeds to ensure that the proposed sale was not consummated.

A close analysis of this argument reveals that subsection c 1/2 actually produces little incremental enforcement advantage. First, the investigative forum provided by the removal permit hearing already is available under the provisions of the ordinance. The board is empowered to conduct hearings, to subpoena witnesses and documents, and to require any owner or

landlord to furnish under oath any information or records the board deems necessary. See ordinance, § 1 (5) (d). Subsection c 1/2, for the most part, merely replicates these preexisting enforcement mechanisms. Second, the alleged advantage of having a "new" remedy - the power to enjoin an illegal condominium sale before it occurs - is not reasonably "necessary" to fulfil the aims of the Rent Control Act. The board already has at its disposal the power to seek fines of $500 a day, or imprisonment for up to ninety days, against both illegal owner-occupiers and persons who knowingly supply it with false testimony or documents. See ordinance, § 12 (c). Furthermore, the board may seek civil damages, injunctive, or declaratory

relief against violators of the ordinance. See ordinance, § 11 (d). It is unreasonable to suggest that simply because violations might be continuing to occur despite this panoply of powerful enforcement mechanisms, a new remedy, of a drastic nature, is "necessary" to save the rent control experiment from failure. It appears to us that the more likely solution lies in more effective utilization of existing enforcement procedures.

Our conclusion in this case follows logically from our earlier holding in Greater Boston Real Estate Bd. v. Boston, 397 Mass. 870 (1986). In the Greater Boston decision, we invalidated a Boston ordinance that banned the sale of controlled rental units to investors who

had not first obtained a removal permit.[9]

---

[9] The board attempts to distinguish the Boston ordinance by noting that, unlike subsection c 1/2, it required that removal permits be granted to any purchaser seeking to occupy a unit as owner and denied permits to any investor who planned to continue renting the unit. This fact, the board contends, explains the Greater Boston court's inability to find any logical nexus between the Boston ordinance and the goals of rent control.
We acknowledge this factual distinction between the two ordinances, but do not consider it legally relevant. As we noted in the Greater Boston decision, the issue presented was "whether the city has the authority to bar [sales to investors], including those that do not involve the eviction of tenants nor the actual removal of rental dwelling units from the market"(emphasis added). Id. at 874. Like Boston, Cambridge is attempting to regulate the sales of rental units, even when such sales result neither in evictions nor in removal of units from the rental housing stock. And while

Like subsection c 1/2, the Boston ordinance rested on implied rather than express powers, and thus, to be valid, was required to be "essential and not merely convenient to the implementation of express powers conferred by statute." Id. at 877. In applying this standard, we concluded that the ordinance had only "minimal" logical connection to preserving Boston's rental

---

the procedure selected by Cambridge is a removal permit requirement rather than an outright ban, the practical effect of the two is likely to be virtually identical. A was noted in the report of the committee on rent control to the Cambridge city council: subsection c 1/2 "would tend to prevent future developer sales to such investor, because they would be unlikely to meet the current tests for removal of such apartment from the rent-controlled market."

housing stock since it prohibited investors "from obtaining permits necessary for condominium...transfers even in circumstances where no tenant is evicted and no unit is in fact removed from the rental market." Id. at 878. This reasoning applies with equal force to subsection c 1/2. It follows from what has been said that Cambridge exceeded the authority conferred on it by the Rent Control Act when it adopted subsection c 1/2 of the ordinance.

The judgment is vacated. A new judgment is to be entered setting aside the decision of the board because subsection c 1/2 has been determined to be invalid, and adjudging that the plaintiffs' property at 16 Chauncy Street in Cambridge, while

otherwise subject to the provisions of the Cambridge rent control and removal ordinances, is not subject to subsection c 1/2 of the removal ordinance.

So ordered.

APPENDIX C

Chapter 36
THE COMMONWEALTH OF MASSACHUSETTS

In the year One Thousand Nine Hundred and Seventy-Six.

AN ACT ENABLING THE CITY OF CAMBRIDGE TO CONTINUE TO CONTROL RENTS AND EVICTIONS. ENACTED MARCH 31, 1976.

Section 1. Declaration of Emergency. The general court finds and declares that a serious public emergency exists with respect to the housing of a substantial number of citizens in the City of Cambridge, which emergency has been created by housing demolition, deterioration of a substantial portion of the existing housing stock, insufficient new housing construction, increased costs of

construction and finance, inflation, influx of young people and the desirability of Cambridge as a place to live, and which has resulted in a substantial and increasing shortage of decent rental housing accommodations especially for families of low and moderate income and for elderly people on fixed income and abnormally high rents; that unless residential rents and eviction of tenants are regulated and controlled, such emergency and the further inflationary pressures resulting therefrom will produce serious threats to the public health, safety and general welfare of the citizens of Cambridge and in other adjacent communities; that such emergency should be met by the Commonwealth immediately and with due regard for the right and

responsibilities of the City of Cambridge...

SECTION 3. Definitions. The following words or phrases as used in this act shall have the following meanings:

(a) "Rental units", any building, structure, or part thereof, or land appurtenant thereto, or any other real or personal property rented or offered for rent for living or dwelling purposes, including houses, apartments, rooming or boardinghouse units, and other properties used for living or dwelling purposes, together with all services connected with the use or occupancy or such property.

(b) "Controlled rental units", all rental units except:

(1) rental units in hotels, motels,

inns, tourist homes and rooming or boarding houses which are rented primarily to transient guests for a period of less than fourteen consecutive days ;

(2) rental units the construction of which was completed on or after January one, nineteen hundred and sixty-nine, or which are housing units created by conversion from a non-housing to a housing use on or after said date;

(3) rental units which a governmental unit, agency, or authority either:

(i) owns or operates; or

(ii) regulates the rents, other than units regulated:

(a) under the provisions of this act, or

(b) under the provisions of any

other general or special law authorizing municipal control of rental levels for all or certain rental units within a municipality; or

(iii) finances or subsidizes, if the imposition of rent control would result in the cancellation or withdrawal, by law, of such financing or subsidy;

(6) the rental unit or units in an owner-occupied two or three-family house;

(7) that the City of Cambridge may exempt those rental units for which the rent charges exceed limits specified by said municipality; provided that in no event shall more than twenty-five per cent of the total rental units in Cambridge be exempted under this subsection.

SECTION 5. Rent Board.

(a) This act shall be administered by a rent control board...

(c) The rent control board, hereinafter called the board, shall be responsible for carrying out the provisions of this act... shall promulgate such policies, rules and regulations as will further the provisions of this act, and shall recommend to the city, for adoption, such ordinances as may be necessary to carry out the purposes of this act.

(e) The board shall have the power to issue orders and promulgate regulations to effectuate the purposes of this act.

SECTION 9. Evictions.

(a) No person shall bring any action to recover possession of a controlled rental unit unless:

(1) the tenant has failed to pay the rent to which the landlord is entitled;

(2) the tenant has violated an obligation or covenant of his tenancy not inconsistent with Chapter 93A of the General Laws or this act, or the regulation issued pursuant thereto, other than the obligation to surrender possession upon proper notice and has failed to cure such violation after having received written notice thereof from the landlord;

(3) the tenant is committing or permitting to exist a nuisance in or is causing substantial damage to, the controlled rental unit, or is creating a substantial interference with the comfort, safety, or enjoyment of the landlord or other occupants of the same or any adjacent

accommodations;

(4) the tenant is convicted of using or permitting a controlled rental unit to be used for any illegal purpose;

(5) the tenant, who had a written lease or rental agreement which terminated on or after this act has taken effect has refused, after written request or demand by the landlord, to execute a written extension or renewal thereof for a further term of like duration and in such terms that are not inconsistent with or violative of any provision of Chapter 93A of the General Laws or this act, or the regulations issued pursuant thereto;

(6) the tenant has refused the landlord reasonable access to the unit for the purpose of making necessary repairs or

improvements required by the laws of the Commonwealth, or any political subdivision thereof, or for the purpose of inspection as permitted or required by the lease or by laws, or for the purpose of showing the rental unit to any prospective purchaser or mortgagee;

(7) the person holding at the end of a lease term is a subtenant not approved by the landlord;

(8) the landlord seeks to recover possession in good faith for use and occupancy of himself, or his children, parents, brother, sister, father-in-law, mother-in-law, son-in-law, or daughter-in-law; except that no action shall be brcught under this clause to recover possession of a condominium unit from a tenant who is

sixty years of age or older and who occupied the unit continuously since before the recording of the master deed.

(9) the landlord seeks to recover possession to demolish or otherwise remove the unit from housing use; and

(10) the landlord seeks to recover possession for any other just cause, provided that his purpose is not in conflict with the provisions and purpose of Chapter 93A of the General Laws or this act, or the regulations issued pursuant thereto. Recovery of possession in order to convert an apartment unit to a condominium unit shall not be a valid reason to recover possession of a controlled rental unit.

(b) A landlord seeing to recover

possession of a controlled rental unit shall apply to the board for a certificate of eviction...

(c) A landlord who seeks to recover possession of a controlled rental unit without obtaining such certificate of eviction shall be deemed to have violated this act, and the board may initiate a criminal prosecution for such violation.

(e) The provisions of this section shall be construed as additional restrictions on the right to recover possession of a controlled rental unit. No provision of this section shall entitle any person to recover possession of such a unit.

SECTION 10. Judicial Review.

(a) Any person who is aggrieved by any action, regulation or order of the

board may file a complaint for judicial review against the board either in the third eastern Middlesex division of the district court department or the superior court department for Middlesex county.... Judicial review of adjudicatory decisions shall be conducted in accordance with section fourteen of chapter thirty A of the General Laws. Judicial review of regulations shall be in accordance with section seven of said chapter thirty A.

SECTION 11. Civil Remedies.

(d) The board may elect to enforce the provisions of this act or any rule or regulation promulgated hereunder either in a civil action for damages for declaratory or injunctive relief or under the provisions of section twelve.

SECTION 12. Criminal Penalties.

(a) It shall be unlawful for any person to demand, accept, receive or retain any rent for the use or occupancy of any controlled rental unit in excess of the maximum rent prescribed therefor under the provisions of this act or any order or regulation hereunder promulgated, or otherwise to do or omit to do any action in violation of the provisions of this act or any order or regulation hereunder promulgated.

(c) Whoever willfully violates any provision of this act or any rule or regulation hereunder promulgated, or whoever knowingly makes any false statement in any testimony before the rent board or whoever knowingly supplies the rent board

with any false information shall be punished by a fine of not more than five hundred dollars or by imprisonment for not more than ninety days or both; provided, however that in the case of a second or subsequent offense, such person shall be punished by a fine of not more than three thousand dollars or by imprisonment for not more than one year, or both.